RECORD AND BRIEFS

No. 16-111

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

MASTERPIECE CAKESHOP, LTD., *et al.*,
Petitioners,

—v.—

COLORADO CIVIL RIGHTS COMMISSION, *et al.*,
Respondents.

ON WRIT OF CERTIORARI TO THE
COLORADO COURT OF APPEALS

BRIEF OF *AMICI CURIAE* FORMER REPRESENTATIVE TONY COELHO, NATIONAL FEDERATION OF THE BLIND, NATIONAL ASSOCIATION OF THE DEAF, AMERICAN COUNCIL OF THE BLIND, DISABILITY RIGHTS BAR ASSOCIATION, DISABILITY RIGHTS ADVOCATES, DISABILITY RIGHTS EDUCATION & DEFENSE FUND, JUDGE DAVID L. BAZELON CENTER FOR MENTAL HEALTH LAW, CIVIL RIGHTS EDUCATION & ENFORCEMENT CENTER, ASSOCIATION OF LATE DEAFENED ADULTS, AUTISTIC SELF ADVOCACY NETWORK IN SUPPORT OF RESPONDENTS, URGING AFFIRMANCE

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INTEREST OF *AMICI CURIAE*[1]

Recognition of freedom of expression and religion defenses to enforcement of civil rights laws, such as those asserted by Petitioners, would seriously weaken statutory and constitutional protections of the rights of people with disabilities to "equality of opportunity, full participation, independent living, and economic self-sufficiency," the express goals of the Americans with Disabilities Act ("ADA"). 42 U.S.C. § 12101(a)(7). Over 56 million Americans—almost 20% of the U.S. population—have a disability. *Americans With Disabilities: 2010*, Matthew W. Brault, U.S. Census Bureau, Rep. No. P70-131, July 2012.

It is not always obvious who constitutes a person with a disability. Under federal law, people entitled to disability civil rights protections include individuals with physical or mental impairments that substantially limit one or more major life activities; individuals with a record or history of such impairment; and individuals regarded as having such impairment. *See* 42 U.S.C. § 12102. This definition "offers a broad scope of protection," and "should not demand extensive analysis." *See* 42 U.S.C. § 12101, note (b)(1) and (5).

Amici Curiae are a principal author of the Americans With Disabilities Act ("ADA") and leading disability rights organizations with substantial expertise related to federal, state, and

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[1] No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution to the preparation or submission of this brief. All parties have consented in writing to the filing of this brief.

local disability rights law and disability rights litigation.

Amici have expertise directly bearing on the issues before the Court. The organizational *Amici* and the lawyers and others who work with and for them are on the front lines enforcing the ADA and state and local laws, such as the Colorado Anti-Discrimination Act ("CADA"). They frequently encounter freedom of expression and religion defenses to proper enforcement of these statutes. Such beliefs, regardless of the sincerity with which they are held, cannot be used as a shield for discrimination in contravention of disability rights entitlements. The cases discussed below are a minor fraction of such instances, constituting just those that have citable references.

The Statements of the twelve Amici are set forth in the Appendix to this Brief.

SUMMARY OF ARGUMENT

In *Obergefell v. Hodges*, this Court secured equal dignity for same-sex couples by guaranteeing them their fundamental right to marry. 135 S. Ct. 2584, 2603 (2015). Consistent with the core of *Obergefell*, the CADA assures LGBTQ people equal dignity by prohibiting discrimination based on sexual orientation in and by places of public accommodation. Colo. Rev. Stat. § 24-34-601. Like its federal counterpart Title II of the Civil Rights Act of 1964, the CADA regulates economic conduct, with "[t]he fundamental object . . . to vindicate 'the deprivation of personal dignity that surely accompanies denials of equal access to public establishments.'" *Heart of Atlanta Motel, Inc. v.*

United States, 379 U.S. 241, 250 (1964) (quoting S.Rep.No.872, 88th Cong., 2d Sess., at 16-17).

In this case, a baker and his bakery seek a federal constitutional exception to this state antidiscrimination law that will allow the business, an undisputed place of public accommodation, to discriminate in the provision of its goods and services on the basis of sexual orientation. Antidiscrimination laws protect members of numerous historically excluded groups. If created, this defense will infect all antidiscrimination laws in our country and will have terrible consequences for all such protected groups, including people with disabilities.

Amici are dedicated to vindication of the dignity of individuals with disabilities through actions seeking to ensure and improve the rights of such individuals to full and equal participation in all aspects of our society. In the ADA, Congress provided a "broad mandate" meant "to remedy widespread discrimination against disabled individuals." *PGA Tour, Inc. v. Martin*, 532 U.S. 661, 674 (2001). The express purpose is "to provide clear, strong, *consistent*, *enforceable* standards addressing discrimination against individuals with disabilities." 42 U.S.C. § 12101(b)(2) (emphasis added). State and local laws, like the CADA, also protect people from discrimination on the basis of disability, as well as sexual orientation, race, and other invidious classifications.

The baker's proposed exceptions to public accommodation laws would jeopardize the ADA's promise of consistent and enforceable standards, and allow an individual's professed scruples to

supersede the rights of historically disadvantaged people to full participation in this nation's economic and commercial life.

Here *Amici* marshal examples of First Amendment defenses already raised by opponents of full enforcement of the ADA, and past attempts to trammel constitutional and legal protections of blacks, women, and members of other constitutionally protected classes.

ARGUMENT

I. CREATION OF A CONSTITUTIONAL PERSONAL SCRUPLES DEFENSE TO ENFORCEMENT OF THE COLORADO ANTIDISCRIMINATION ACT JEOPARDIZES LEGISLATIVE PROTECTIONS OF PERSONS WITH DISABILITIES.

Antidiscrimination laws are enacted and enforced to vindicate the freedom and human dignity of historically oppressed, discretely identifiable groups. Court-created exceptions of the type proposed by Petitioners would riddle our antidiscrimination protections with holes and erect significant procedural barriers to enforcement of these important rights, even where such defenses lack merit.

The Colorado Court of Appeals correctly rejected Petitioners' arguments for a religious liberty or free speech exception to the CADA. The Court of Appeals found that the baker and his bakery were not entitled to a religious exemption from the law, because the "CADA is a neutral law of general applicability," not one that

discriminates on the basis of religion. *Craig v. Masterpiece Cakeshop, Inc.*, 370 P.3d 272, 288 (Colo. App. Aug. 13, 2015). It also correctly held that the CADA did not compel Petitioners to convey any particular message by and through his cakes, and that the commercial nature of the transaction reduced the likelihood that any reasonable observer would believe that the baker supported the message, if any, expressed in its finished product. *Id.* at 286-87.

This last point is one of critical importance. This Court has held that, when determining whether conduct is sufficiently expressive to trigger First Amendment protections, a reasonable observer should be presumed to "appreciate the difference" between speech that is endorsed by the speaker and speech that is merely "legally required." *Rumsfeld v. Forum for Acad. & Institutional Rights, Inc.*, 547 U.S. 47, 65 (2006).

All legally required conduct can be reframed as a compelled message of agreement with the underlying policy that is being served. But this Court has warned against this unnerving proposition. *See id.; Employment Div., Dep't of Human Res. of Oregon v. Smith*, 494 U.S. 872, 878 (1990) ("It is no more necessary to regard the collection of a general tax, for example, as 'prohibiting the free exercise [of religion]' by those citizens who believe support of organized government to be sinful, than it is to regard the same tax as 'abridging the freedom . . . of the press' of those publishing companies that must pay the tax as a condition of staying in business.").

A. Petitioners' Free Exercise Defense Would Upset the Careful Balance Civil Rights Laws Have Struck Between First Amendment and Equal Protection Rights.

"The free exercise of religion means, first and foremost, the right to believe and profess whatever religious doctrine one desires." *Id.* at 877. And surely religious leaders have been at the forefront of advancing civil rights for centuries. But the United States is "a country whose people came from the four quarters of the earth and brought with them a diversity of religious opinion." *Sch. Dist. of Abington Twp., Pa. v. Schempp*, 374 U.S. 203, 214 (1963). Religious pluralism is an asset to our democracy, but civil society requires a strong line between an individual's civic responsibilities under the law and the individual's personal religious beliefs and practices. To make the "professed doctrines of religious belief superior to the law of the land [is] in effect to permit every citizen to become a law unto himself. Government could exist only in name under such circumstances." *Reynolds v. United States*, 98 U.S. 145, 167 (1878).

Congress struck a balance in Title III of the ADA by exempting from coverage "religious entities or entities controlled by religious organizations, including places of worship." *See* 42 U.S.C. § 12187; 56 Fed. Reg. 35544-35691 (Jul. 26, 1991) (describing the religious organization exemption as "very broad" and stating that "even when a religious organization carries out activities that would otherwise make it a public accommodation, the religious organization is

exempt from ADA coverage"). "The test is whether the church or other religious organization operates the public accommodation." *Id.* Petitioners' free exercise exemption would upend this balance, and allow any individual business owner to assert their beliefs as a defense to their economic conduct in the public square.

Most places of worship have been aggressive leaders in inclusion, despite this statutory exemption, and *Amici* do not question the commitment to inclusion of the overwhelming majority of people of faith. At the same time, many faiths have at least some citable, scriptural basis for shunning people with disabilities. *See, e.g.*, Leviticus 21:17-20 ("[N]one of your descendants who has a defect may come near to offer the food of his God."); *Pain and Suffering as Viewed by the Hindu Religion*, Sarah M. Whitman, MD, The Journal of Pain, Vol. 8, No. 8 (Aug. 2007), at 607-13; *The Buddha Speaks the Sutra on Cause and Effect in the Three Periods of Time*, Translated by the Buddhist Text Translation Society ("The blind of this world bear a heavy burden for past failure to tell the way clearly to travelers."); Koran 6:39 ("Those who reject our Signs are deaf and dumb, - in the midst of darkness profound."). Because courts do not inquire into the sincerity of professed religious beliefs, Petitioners' free exercise exception would create a plausible defense, which in many instances would swallow enforcement of the ADA and similar state and local laws.

1. The Principal Sponsor of the ADA Personally Faced Religiously Based Discrimination Due to His Disability.

In 1988, United States Representative Anthony Coelho of California introduced H.R.4498, the House version of the Americans with Disabilities Act. Rep. Coelho, who has epilepsy, testified in support of the bill's passage about his own experiences with religiously motivated discrimination on the basis of his disability.

> As a young man, I developed seizures, later diagnosed as epilepsy. For many years, for 5 years, as I had my seizures on a regular basis, I did not know what they were. I went to every doctor that you could think of. I also went to three witch doctors, because I was supposedly possessed by the devil. My Republican colleagues think I am, but others believed I was. . . .
>
> In my senior year [of college] . . . . I decided I wanted to become a Catholic priest. As I graduated with honors, I then had a physical exam in order to enter the seminary. The physical exam pointed out that the seizures I'd been having for 5 years meant that I had epilepsy.
>
> I always remember very well what happened, in that I walked to the doctor's office from my car, sat in the doctor's office, was told about my epilepsy, walked back to my car, got back in my car and drove back to my fraternity house and I

was the same exact person. But only in my own mind because the world around me changed.

My doctor had to notify the legal authorities of my epilepsy. My church was notified and immediately I was not able to become a Catholic priest, because my church did not, at the time, permit epileptics to be priests. My driver's license was taken away, my insurance was taken away. Every job application has the word epilepsy on it and I marked it, because I was not going to lie. And I couldn't get a job.

My parents refused to accept my epilepsy. I became suicidal and drunk by noon. . . . I had not changed as a person. The only reason is that [the] world around me had changed. The light had been turned off, the light of opportunity, the light of hope. . . .

I'm here today, serving in the capacity that I serve, because some people believe[d]. Not because my government protected me, not because my government protected my basic civil rights.

I am a major advocate of this bill because I want to make sure that other young people, as [they're] looking for hope, as they believe that the system should work for them, have that hope, have that opportunity. . . .

That is what this bill is all about; 36 million Americans deciding it is time for

> us to stand up for ourselves, to make a difference, to say we want our basic civil rights also. We deserve it.
>
> Give us an opportunity to do what we can do, do not keep telling us what we cannot do.

S. 2345 to Establish a Clear and Comprehensive Prohibition of Discrimination on the Basis of Handicap: Joint Hearing Before the Subcomm. on the Handicapped of the S. Comm. on Labor & Human Res. & Subcomm. on Select Ed. of the H. Comm. of Ed. & Labor, 100th Cong. 11-12 (1988) (statement of Rep. Coelho).

Representative Coelho referenced the Canon Law (Codex Iuris Canonici), promulgated in 1917, which was the classification of laws and jurisprudence that governed the Roman Catholic Church until its reorganization in 1983. It forbade to be ordained "those who are or were epileptics either not quite in their right mind or possessed by the Evil One," hence Representative Coelho's reference to the belief that he was "possessed by the devil." In the revised Code of Canon Law, promulgated in 1983, reference to physical disability and the connection between possession by evil and epilepsy were removed, and replaced by a prohibition on "insanity or other psychic defect," evaluation of which is to be done by experts.

Representative Coelho's experience illustrates two key points. First, the framers of the ADA sought to remedy discrimination against persons with disabilities, including religiously motivated discrimination. Hence, Petitioners' position risks

promoting to constitutionally protected status the very attitudinal barriers and prejudices that Congress enacted the ADA to remedy. The disapproval of groups of people that underlies discriminatory treatment commonly derives from or is supported by religious beliefs, as in the case of the baker here.

Second, it demonstrates that religious beliefs, and the views of religious organizations, can and do change with developing social and cultural norms. The transient nature of religious prejudices against persons with disabilities counsels in favor of applying disability rights protections without exception for such beliefs.

2. Accommodations for People with Disabilities Have Been Wrongfully Denied on the Basis of Religious Belief.

In practice, disability discrimination is often motivated by sincere religious belief. *Amici* through litigation, client contact, and personal experience have encountered examples of discriminatory conduct against persons with disabilities framed as a compulsion of religious conviction.

In *Stevens v. Optimum Health Institute*, 810 F. Supp. 2d 1074 (S.D. Cal. Aug. 24, 2011), a blind woman brought an action against a non-profit, religious organization which operated a holistic health program, alleging it violated California state disability rights protections—the Unruh Civil Rights Act and Disabled Persons Act—by denying her services in a place of public accommodation because of her disability. Plaintiff

sought to attend the institute either with her service dog, or unaccompanied with the aid of her cane. *Id.* at 1081. The Institute refused as to both. *Id.* The Court granted summary judgment for plaintiff finding that defendant violated both California laws by refusing to permit her to attend the institute with her cane. *Id.* at 1100.

With regard to her request for a service dog accommodation, the Health Institute took the position that allowing the animal would violate the program's religious sanctity. In a declaration filed as part of the summary judgment proceedings, Defendant Nees, the Ecclesiastical Superior of the program's parent religious organization stated:

> The grounds of OHI are sacred. In order to maintain a pure environment for healing and worship, OHI cannot—and does not—welcome animals. . . . [I]n the eyes of the Church, based upon the teachings of the Old Testament, OHI's grounds are sacred but animals are not. . . . Allowing animals into the grounds is antithetical to the promotion of a safe, healing environment at the Institute, particularly for people who have animal phobias or allergies. . . .
>
> In my role as Ecclesiastical Superior, I determined that even a remote chance of Plaintiff, attending OHI without a sighted companion, needing assistance in the unfamiliar environment of OHI or during the OHI program, posed an unacceptable risk of disrupting the spiritual path of others in attendance.

Id. at 1081.

The court granted summary judgment for plaintiff as to accessing the program unaccompanied with the use of her cane, but held that a genuine dispute of material fact existed as to the effect of the presence of plaintiff's service dog on the free association rights of the program and religious organization. *Id.* at 1094-95. This despite settled law that a service dog is a required accommodation in most circumstances. *See Lentini v. California Ctr. for the Arts, Escondido*, 370 F.3d 837, 845 (9th Cir.2004); 135 Cong. Rec. S.10,800 (1989) (statement of Sen. Simon) ("[a] person with a disability and his . . . [service] animal function as a unit" such that separating the two generally "[is] discriminatory under the [ADA]").

The belief that dogs are religiously unclean or otherwise to be avoided is not a belief unique to the defendants in *Stevens*. Individuals who rely on service dogs are routinely denied service by stores and other public accommodations, including taxis and rideshare services. Blind or low-vision individuals disproportionately rely on these services for transportation, but frequently encounter denials because of the presence of a service animal. Such denials are sometimes religiously motivated. *See, e.g., Minnesota's Muslim Cab Drivers Face Crackdown*, Reuters, Apr. 17, 2007 (detailing large number of Muslim taxi drivers in the area of the Minneapolis-St. Paul International Airport who refused to transport dogs because they are unclean), available at: https://www.reuters.com/article/us-muslims-taxis/minnesotas-muslim-cab-drivers-face-crackdown-idUSN16332892200704 17.

Some have used religious beliefs to justify discrimination against persons infected with HIV, *see Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1118 n.7 (9th Cir. 2009), and refusing service to a person because of HIV/AIDS status violates the ADA. *See Bragdon v. Abbott*, 524 U.S. 624, 641 (1998) (recognizing clear congressional intent to prohibit discrimination based on HIV status, and holding that asymptomatic HIV infection is a disability under the ADA). Yet cases still abound where religious scruples have been asserted as a defense to providing service to HIV-infected people. In *Selecky*, asserting religious objections, pharmacists unsuccessfully challenged a Washington law prohibiting pharmacies from refusing to deliver lawfully prescribed or approved medicines. 586 F.3d at 1116 & n.7. If Petitioners' free exercise defense were accepted, it would take very little for such defenses to be asserted perhaps successfully against disability rights claims to access public accommodations and delivery of health services. *Cf. also Doe v. Deer Mountain Day Camp, Inc.*, 682 F. Supp. 2d 324, 331 (S.D.N.Y. 2010) (plaintiff's claim that defendant basketball camp discriminated against him—in denying him admission to the camp—on the basis of his HIV+ status, in violation of ADA and NY law, was defended on the basis of pseudo-science about the danger of HIV and its transmissibility); *Bradford v. Prosoft, LLC*, No. 3:16-CV-00373-CRS-DW, 2017 WL 1458201, at *1 (W.D. Ky. Apr. 24, 2017) (plaintiff, a transgender man, brought suit against his former employer under the Family Medical Leave Act, Title I of the ADA, and Title VII of the Civil Rights Act of 1964 because, after he was outed as being transgender, his employer refused

him time off for necessary disability-related surgery and fired him).

B. Defendants Frequently Assert Inappropriate Free Expression Defenses to Disability Rights Claims.

Defendants in the private sector often attempt to recast their economic conduct as protected free expression. While "all business activity takes place through speech" on some level, this Court has never placed purely transactional conduct on the same level as core protected speech. *See* Transcript of Oral Argument at 9:7-9, *Expressions Hair Design v. Schneiderman*, 137 S. Ct. 1144 (15-1391) (question of Breyer, J.).

1. Some Defendants Have Argued That Branding Is Free Expression That Justifies Violating Accessibility Requirements.

The ADA and similar state and local laws generally require new construction to be "readily accessible." *See* 42 U.S.C. § 12183(a)(1). This has not stopped recalcitrant merchants from engaging in branding-motivated design choices that exclude people with mobility disabilities.

In *Colorado Cross-Disability Coal. v. Abercrombie & Fitch Co.*, defendants operated the surf-lifestyle clothing brand Hollister, which installed in its stores "a raised porch-like platform . . . two steps above ground level," which was "not accessible to people in wheelchairs," to evoke the ambience of a surf shack. 835 F. Supp. 2d 1077, 1078 (D. Colo. 2011). As a teen-targeting brand Hollister is "all about hot lifeguards and beautiful beaches. . . . [When] Denver policy analyst Farrar

was nudged by her 12-year-old daughter to wade into the retail 'fantasy of Southern California' . . . Farrar's wheelchair couldn't make it up the steps of the store." *Denver Judge: Abercrombie Brand Hollister Violating Disabilities Act*, The Colorado Independent, Susan Greene, May 16, 2013, available at: http://www.coloradoindependent.com/127705/denver-judge-abercrombie-brand-hollister-violating-disabilities-act. Farrar's frustration at the store's inaccessible front stairway became a nationwide class action against 248 Hollister stores, garnering the support of the U.S. Justice Department, which characterized the store's inaccessible entrances as built in plain violation of the ADA's accessibility requirements, with the effect of pushing people in wheelchairs to enter the store separately from the side. *Id.*

The district court enjoined the defendants to remove their inaccessible platform display, noting that "Defendants have unnecessarily created a design for their brand that excludes people using wheelchairs from full enjoyment of the aesthetic for that brand. The steps to the center entrance are a legally unacceptable piece of that branding and violate Title III of the ADA." *Id.* at 1083, vacated on statutory grounds by *Colorado Cross Disability Coal. v. Abercrombie & Fitch Co.*, 765 F.3d 1205 (10th Cir. 2014). *See Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 781 (1976) (warning of "elevat[ing] commercial intercourse between a seller hawking his wares and a buyer seeking to strike a bargain to the same plane as has been previously reserved for the free marketplace of ideas" (Rehnquist, J., dissenting)); *cf.* Pet. Br. 1, 5

(describing Petitioners' business logo in support of argument that Petitioners' cakes are expressive).

2. Some Defendants Have Argued That Refusal to Accommodate Is Justified as First Amendment Protected Academic Freedom.

Refusal of disability accommodation on the basis of academic freedom implicates different concerns from the purely transactional world of commercial branding. The right to full and equal access to education is of paramount importance to the ADA's concerns, and shares obvious commonalities with "[t]he process of ending unconstitutional exclusion of pupils from the common school system." *Cooper v. Aaron*, 358 U.S. 1, 25 (1958) (Frankfurter, J., concurring). And yet, in this critical sphere of integration, the disability community continues to face significant resistance.

In the late 90s at Boston University, incoming Provost Jon Westling gutted a well-functioning learning disabilities support services program, and a class action suit ensued to roll back his policy changes and ensure continued reasonable accommodations for 480 enrolled students with learning disabilities, principally dyslexia and ADD/ADHD. The district court found violations of the ADA and Article 114 of the Massachusetts Constitution, which provides a broad guarantee of freedom from public and private discrimination on the basis of disability. *Guckenberger v. Boston Univ.*, 974 F. Supp. 106, 117 (D. Mass. Aug. 15, 1997).

While he was dismantling BU's disability services program, Provost Westling made a series of public statements, in which he accused learning disability advocates of fashioning fictitious impairments, and argued that "the learning disability movement is a great mortuary for the ethics of hard work, individual responsibility, and pursuit of excellence, and also for genuinely humane social order." *Id.* at 118. The Court noted that Westling was motivated both by "a genuine concern for academic standards" and by "uninformed stereotypes" about students with learning disabilities. *Id.* at 149. It faulted BU for its failure to "dispassionately determine" whether the requested accommodations would "change the essential academic standards of its liberal arts curriculum." *Id.* If Petitioners prevail on their First Amendment expressive freedom defense, it would militate against courts carefully scrutinizing such administrative decisions. When considering the reasonableness of requested academic accommodations, courts must "study the assumptions underlying academic programs," and not merely defer to "attitudinal biases about the abilities of people with learning disabilities," cloaked in First Amendment academic freedom. *See* Peter David Blanck, *Civil Rights, Learning Disability, and Academic Standards*, 2 Journal of Gender, Race, & Justice 33, 53 (1998); *see also Redding v. Nova Se. Univ., Inc.*, 165 F. Supp. 3d 1274, 1297 (S.D. Fla. 2016) ("A determination of whether an accommodation is related to a disability involves no academic judgment and judicial review of such a decision does not offend principles of academic freedom. [Defendant] cannot immunize all of its decisions from review

by waving the flag of deference merely because it is an academic institution.").

A recent DOJ investigation into the accessibility of UC Berkeley's publicly available, free, online audio and video content resulted in findings that the program violated Title II's mandate that no individual by reason of her disability may be excluded from participation in or be denied the benefits of services, programs, or activities of a public entity. *See* 42 U.S.C. § 12132; 28 C.F.R. § 35.130(a). UC Berkeley's online content lacked captions and audio descriptions, documents were not appropriately formatted, and websites, materials, and other portals were similarly not accessible, obstructing participation for individuals with hearing, vision, or manual disabilities. *See* Aug. 30, 2016 letter from Rebecca B. Bond, Disability Rights Section Chief, Department of Justice to UC Berkeley Chancellor Nicholas B. Dirks, et al., DJ No. 204-11-309, available at: https://www.ada.gov/briefs/uc_berkley_lof.pdf.

Rather than commit resources to correcting these shortcomings, UC Berkeley responded by taking all of content offline. *See* Mar. 1, 2017 Statement of UC Berkeley Vice Chancellor Cathy Koshland, re Campus Message on Course Capture Video, Podcast Changes, available at: http://news.berkeley.edu/2017/03/01/course-capture/. The result is a public deprivation reminiscent of the City of Jackson's closure of all public pools when faced with court-ordered integration. *See Palmer v. Thompson*, 403 U.S. 217, 225, 254 (1971) (noting City's argument that integrated "pools could not be operated safely or economically on an

integrated basis." (White, J., dissenting)). Under Petitioners' expanded free expression theory, UC Berkeley may have simply refused to correct its unequal provision of content, framing each requested accommodation as an infringement of academic freedom.

II. HISTORY TEACHES THE IMPORTANCE OF FULL ENFORCEMENT OF ANTI-DISCRIMINATION LAWS IN THE FACE OF EXPRESSIVE AND RELIGIOUS FREEDOM DEFENSES AND ASSERTIONS.

Religious defenses to claims of racial discrimination were once common. In *Loving v. Virginia*, this Court noted the words of the Virginia trial court judge in which the action originated: "Almighty God created the races white, black, yellow, malay and red, and he placed them on separate continents. And but for the interference with his arrangement there would be no cause for such marriages. The fact that he separated the races shows that he did not intend for the races to mix." 388 U.S. 1, 3 (1967). The Court roundly rejected this as a justification for discrimination. *Id.* at 7.

In *Bob Jones University v. United States*, a private university challenged the Internal Revenue Service's revocation of its tax exempt status for its racially discriminatory admissions policy. 461 U.S. 574, 580 (1983). The university asserted that its policy was based on a genuine belief that the Bible forbids interracial dating and marriage, and that it was therefore protected by the Free Exercise Clause. *Id.* at 622. The Court

found that the government had a fundamental, overriding interest in eradicating racial discrimination in education which substantially outweighed the burden on the petitioners' free exercise of religion. *Id.* at 605; *see also EEOC v. Miss. Coll.*, 626 F.2d 477, 488 (5th Cir. 1980) ("[T]he government has a compelling interest in eradicating discrimination in all forms.").

In his 1959 essay *Toward Neutral Principles of Constitutional Law*, Herbert Wechsler wrote that the constitutional battle over racial segregation was really a battle between conflicting associational rights, between those who did and those who did not want to associate with members of another race. Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 Harvard Law Review 1, 34-35 (1959). In response, Charles Black, who was born and raised in Texas and knew Jim Crow first hand, got to the heart of the matter. He lamented that "simplicity is out of fashion." Charles L. Black, Jr., *The Lawfulness of the Segregation Decisions*, 69 Yale Law Journal 421 (1960). Counter to Wechsler, Black argued that where a group is barred from the common life of the community, the law must take notice in name and in application. *Id.* at 423.

So too Alexander Bickel replied to Wechsler: "What, on the score of generality and neutrality, is wrong with the principle that a legislative choice in favor of a freedom not to associate is forbidden, when the consequence of such a choice is to place one of the groups of which our society is constituted in a position of permanent, humiliating inferiority; when the consequence beyond that is to foster in the whites, by authority

of the state, self-damaging and potentially violent feelings of racial superiority—feeling that, as Lincoln knew, find easy transference from Negroes to other groups as their particular objects?" Alexander Bickel, *The Least Dangerous Branch*, Yale University Press (1962), at 57.

A position similar to Wechsler's was later bandied as Congress debated the Civil Rights Act of 1964. Robert Bork wrote in the *New Republic* that the Act's guarantee of equal access to public accommodations regardless of race would infringe the free association rights of those who viewed integration as an evil. Robert Bork, *Civil Rights—A Challenge, New Republic*, Aug. 31, 1963, at 21. "The danger is that justifiable abhorrence of racial discrimination will result in legislation by which the morals of the majority are self-righteously imposed upon a minority," which he called "a principle of unsurpassed ugliness." *Id.* at 22. The Supreme Court's decision in *Heart of Atlanta Motel* resolved the question against Bork's position, and in favor of governmental authority to protect the citizenry from private discrimination.

While Wechsler protested the *Brown* decision in part because he preferred for societal problems to be solved by legislatures, not courts, the anti-discrimination protections at risk in this case are not the product of judicial creation. The Colorado legislature made a valid determination that a person's being LGBTQ, or having a disability, is not an acceptable reason to deny equal treatment in public places, services, and goods.

As the Court recognized in *Obergefell v. Hodges*, sexual orientation discrimination is a constitutional wrong, just as racial discrimination

is a constitutional wrong. 135 S. Ct. at 2599. In *dicta* the Court noted that the First Amendment protects an individual's right to hold anti-same sex marriage views. That insight does not render the government powerless to prohibit discrimination against LGBTQ people by a commercial business open to the public when it claims a First Amendment exemption.

CONCLUSION

Consistent with this Court's longstanding approach to civil rights protections, and informed by our nation's history of discrimination against persons with disabilities and other discrete minorities, the Court should affirm the judgment of the Colorado Court of Appeals and confirm that our nation's civil rights laws are not subject to a constitutional exception based on the scruples of a defendant.

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Respectfully submitted,

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APPENDIX

APPENDIX OF STATEMENTS OF THE INDIVIDUAL *AMICI*

Former U.S. Representative Anthony ("Tony") Coelho represented California's 15th District in the U.S. House of Representatives from 1979 until 1991. Mr. Coelho has epilepsy. When he was in his twenties, Mr. Coelho faced disability discrimination from the Catholic church, which at the time viewed epilepsy as a sign of demonic possession. Mr. Coelho subsequently became a vigorous advocate for disability rights, and was the principal sponsor of the Americans with Disabilities Act. Mr. Coelho believes that if adopted, Petitioners' defenses to enforcement of the CADA will cut back drastically on the promise of the ADA.

The National Federation of the Blind ("NFB"), the oldest and largest national organization of blind persons, is a non-profit corporation headquartered in Baltimore, Maryland. It has affiliates in all 50 states, Washington, D.C., and Puerto Rico. NFB and its affiliates are recognized by the public, Congress, executive agencies of state and federal governments, and the courts as a collective and representative voice on behalf of blind Americans and their families. NFB advocates on behalf of blind people on a broad range of issues, including transportation, education, employment, and technology. The ultimate purpose of NFB is the complete integration of the blind into society on a basis of equality. This objective includes the removal of legal, economic, and social discrimination.

The National Association of the Deaf ("NAD") is the oldest national civil rights organization in the United States, and the premier civil rights organization of, by, and for deaf and hard-of-hearing individuals in the country. NAD's membership includes over 7,000 individuals and over 100 associations from all fifty states and Washington, D.C. NAD's mission is to preserve, protect, and promote the civil, human, and linguistic rights of the 48 million deaf and hard-of-hearing people in the United States. To accomplish this goal, NAD advocates for deaf and hard-of-hearing Americans on a broad range of issues including communications, technology, employment, education, and healthcare. NAD has participated in federal and state courts as counsel or *amicus* to protect the rights of deaf and hard-of-hearing Americans. Adoption of Petitioner's defenses to the application of the CADA would seriously hamper pursuit of NAD's mission.

The American Council of the Blind ("ACB"), founded in 1961, is a grassroots organization comprised primarily of individuals who are blind or who have low vision. For over half a century, ACB has advocated for the civil rights of and equal opportunities for persons with vision impairments. Special education, services for seniors with vision loss, employment programs, and discrimination in public accommodations, including violations of the rights of guide dog handlers are just a few of the areas in which the council advocates. ACB believes that if adopted, Petitioners' defenses would severely undermine the ADA and similar state laws. Taxi drivers, restaurants, hotels and other types of businesses could elect to base discrimination against guide

dog users on religious or free speech grounds. Private schools and colleges could refuse to allow service animals on their campuses. Thus, ACB is extremely interested in ensuring that First Amendment rights are not found to form a legal basis for businesses to violate the legal rights of persons with disabilities.

The Disability Rights Bar Association ("DRBA") is a network of attorneys who specialize in disability civil rights law. Two core purposes of DRBA are to advance and enforce the rights of people with disabilities in all spheres of life through the use of litigation and other legal advocacy strategies, and to disseminate information regarding disability law and advocacy. DRBA enters cases as *amicus* to support cases that enforce and promote the rights of people with disabilities. Its members, who are on the front lines enforcing disability rights, are concerned that the exceptions to the CADA advocated by Petitioners will seriously limit enforcement of statutes protecting people with disabilities.

Disability Rights Advocates ("DRA") is a non-profit legal center dedicated to ensuring dignity, equality, and opportunity for people with all types of disabilities, and to securing their civil rights. DRA represents people with the full spectrum of disabilities in complex, system-changing, class action cases. To further its mission, DRA believes that the rights of people with disabilities to participate in society will be seriously eroded if this Court adopts Petitioners' proposed constitutional exceptions to civil rights laws based on personal scruples.

The Disability Rights Education & Defense Fund ("DREDF"), based in Berkeley, California, is a national non-profit law and policy center dedicated to protecting and advancing the civil rights of people with disabilities. Founded in 1979 by people with disabilities and parents of children with disabilities, DREDF pursues its mission through education, advocacy, and law reform efforts. DREDF is nationally recognized for its expertise in the interpretation of federal disability civil rights laws, and has participated as *amicus* in numerous high court matters involving those laws.

The Judge David L. Bazelon Center for Mental Health Law is a national non-profit legal advocacy organization founded in 1972 to advance the rights of individuals with mental disabilities. The Bazelon Center uses litigation, public policy advocacy, education, and training to advocate for laws and policies that ensure equal opportunities for people with mental illness or intellectual disability in all aspects of their lives, including the opportunity to participate fully in their communities. The Bazelon Center has participated as *amicus* in numerous cases involving the rights of people with disabilities heard by this Court.

The Civil Rights Education and Enforcement Center ("CREEC") is a national non-profit membership organization whose mission is to defend human and civil rights secured by law, including laws prohibiting discrimination on the basis of disability. CREEC's efforts to defend human and civil rights extend to all walks of life, including ensuring that people with disabilities have full and equal access to

places of public accommodation. CREEC lawyers have extensive experience in the enforcement of Title III of the Americans with Disabilities Act ("ADA") similar state and local laws. On the front lines of enforcing the protections of disabled people they encounter defenses like those asserted by Petitioners, CREEC believes rejecting them is essential to full and appropriate enforcement of the CADA and comparable statutes.

The Association of Late Deafened Adults ("ALDA") is an association of deafened people. ALDA is dedicated to supporting the empowerment of deafened people through building community and advocacy. ALDA pursues legal advocacy, including entering as *amicus* in federal cases, to advance and protect the rights of deafened people. If Petitioners' arguments are accepted, ALDA's constituency will be at risk.

The Autistic Self Advocacy Network ("ASAN") is a 501(c)(3) non-profit organization run by and for autistic people. ASAN advocates to improve opportunity for, and the lives of, Americans with autism, and to ensure that the voices of autistic people are heard in policy debates in government and across society. ASAN's advocacy includes providing information to the public about autism and disability rights, and working to enforce the rights of autistic people to equal opportunity at school, at work, and throughout society. ASAN believes that rejecting Petitioners' defenses to full enforcement of the CADA are essential to its mission.